In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 180

PAUL C. EDWARDS & EDWARDS ENTERPRISES, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the Northern District of Oklahoma of the sale of unregistered securities, and fraud in the sale of interests in oil and gas leases. The individual petitioner was sentenced to imprisonment for four years and the corporation was fined $1,000. The convictions were affirmed on appeal (Pet. App. A).

The only question that petitioners urge as warranting review by this Court is whether the court re-

porter's failure to record the discussions at bench conferences—most of which concerned the admissibility of evidence (2 Tr. 273, 448, 527, 625; 3 Tr. 645-655, 760, 762)—was illegal *per se* regardless of whether any prejudice to petitioners resulted or was likely.[1]

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[1] Petitioners' trial counsel raised no objection at trial to the failure to record, although they did submit, in connection with a motion for a new trial, an affidavit that they had been unaware that the conversations and rulings at the bench were not being recorded (1 Tr. 125-130). In the court of appeals, petitioner Paul Edwards argued that the failure to record had prejudiced him since at one unreported conference tender was made that each of the character witnesses would testify that Edwards had a reputation of being a good, law-abiding citizen, honest and a man of integrity, but the court limited the inquiry at trial to whether Edwards had a reputation as a good, law-abiding citizen. This limitation was not prejudicial, and in any event presents a distinct issue from whether the bench conference should have been recorded. As the court of appeals noted (Pet. App. A. p. 18), it appears on the record that petitioners' counsel inquired of the first character witness whether he knew the general reputation of Edwards as being "a good, law-abiding citizen, one who is honest and a man of integrity." The court sustained an objection to the question as improper (3 Tr. 830-831) and the bench conference in question ensued. The court of appeals upheld the limitation imposed by the district court, finding that the traits of honesty and integrity were "included in the all-encompassing question asked each witness as to Edwards' reputation as a good, law-abiding citizen" (Pet. App. A. p. 19) and noting that the testimony of the seven character witnesses was uncontradicted and unchallenged. Petitioners do not urge this ruling as a basis for allowing certiorari, although they assert they will challenge it if certiorari is granted (Pet. 13-14).

Petitioners also challenge the district court's instruction on reasonable doubt, asserting that, if certiorari is granted, they will argue that the instruction was plain error requiring

Such contentions have been uniformly rejected. *Strauss* v. *United States*, 311 F. 2d 926 (C.A. 5), certiorari denied, 373 U.S. 910; *Addison* v. *United States*, 317 F. 2d 808 (C.A. 5), certiorari denied, 376 U.S. 905; *Stirone* v. *United States*, 341 F. 2d 253 (C.A. 3), certiorari denied, 381 U.S. 902; *Burns* v. *United States*, 323 F. 2d 269 (C.A. 5), certiorari denied, 376 U.S. 907. The failure to record a bench conference, which normally is merely a preliminary step to a ruling reflected in the record, cannot be likened to the complete absence of a transcript. Some prejudice, or danger thereof, must be shown; and no such showing was made here.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
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FRED M. VINSON, JR.,
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JUNE 1967.

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reversal despite the absence of objection (Pet. 14-15). As petitioners admit, however (Pet. 14), a similar instruction was held not to be plain error in *Holland* v. *United States*, 348 U.S. 121, 140.

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